Supreme Court, U.S.
FILED
AUG 19 2004
OFFICE OF THE CLERK

No. 04-108

In the
Supreme Court of the United States

SUSETTE KELO, *et al.*,

Petitioners,

v.

CITY OF NEW LONDON, CONNECTICUT, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Connecticut

BRIEF AMICUS CURIAE OF JAMES M. BUCHANAN AND GORDON TULLOCK AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

TIMOTHY SANDEFUR
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae Buchanan, Tullock, and Pacific Legal Foundation

QUESTION PRESENTED

The Fifth Amendment, as incorporated to the states, limits the power of eminent domain to "public use[s]." The state of Connecticut condemned private property to transfer to private developers who use it for their own profit. Do the social benefits resulting from this profit constitute a "public use"?

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. Written consent for the filing of this brief was granted by counsel for all parties and lodged with the Clerk of the Court.

PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government, and private property rights. PLF represented property owners in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and participated as amicus curiae in *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

James M. Buchanan, Ph.D., is Distinguished Professor Emeritus of Economics at George Mason University and University Distinguished Professor Emeritus of Economics and Philosophy at Virginia Polytechnic and State University. He was awarded the 1986 Nobel Prize in Economics. Gordon Tullock, J.D., Ph.D., is University Professor of Law and Economics and Distinguished Research Fellow in the James M. Buchanan Center for Political Economy at George Mason University. Together, Professors Buchanan and Tullock were the authors of *The Calculus of Consent* (1965), and are considered the fathers of "public choice" economics, a major

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[1] Pursuant to Supreme Court Rule 37.6 counsel for a party did not author this brief in whole or in part. No person or entity, other than amici curiae, their members, or their counsel made a monetary contribution specifically for the preparation or submission of this brief.

area of economic theory which explains lobbying behavior in democratic societies.

Because of its history and experience with regard to private property and the power of eminent domain, PLF believes its perspective will aid this Court in considering the petition. Because of their understanding of the public choice problems inherent in the use of eminent domain for "economic redevelopment" purposes, Professors Buchanan and Tullock believe their perspective will also aid the Court in considering the petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution prohibits the government from taking private property for anything except a "public use." U.S. Const. amend. V. Private property may not be taken for private uses at all. Yet this Court's decision in *Berman v. Parker*, 348 U.S. 26 (1954), reduced the Public Use Clause to a practical nullity. As a result, states and local governments routinely take property for redistribution to private interests, particularly businesses which use the property for their own private profit.

Erasing the Public Use limitation has resulted in what economists call "rent seeking": private parties try to gain control of the eminent domain power and use it for their own advantage. Rent-seeking behavior is economically wasteful, damages the rule of law, and seriously undermines private property rights. In the past five years alone, there have been approximately 10,000 reported cases of condemnation or threatened condemnation for the benefit of private parties. *See generally* Dana Berliner, *Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain* (2003). Those who suffer the most from the public choice effect are the parties who have the least political influence, which usually means racial minorities and the poor. Donald J. Kochan, *"Public Use" and the Independent*

Judiciary: Condemnation in an Interest-Group Perspective, 3 Tex. Rev. L. & Pol. 49, 56 (1998).

Only this Court can restore the Public Use Clause as an effective constitutional limit on the abuse of government power. The Court has repeatedly declared that such private takings are unconstitutional. *See, e.g., Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). Certiorari should be granted here to elevate this language from dicta to holding, and by so doing, restore the Constitution's protections for private property.

REASONS FOR GRANTING THE WRIT

I

BERMAN AND *MIDKIFF* HAVE LED TO AN EPIDEMIC OF CONDEMNATIONS FOR PRIVATE PROFIT WHICH ONLY THIS COURT CAN REMEDY

Early in its history, this Court explained that government had no constitutional authority to "take[ ] property from A and give[ ] it to B . . . ." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). In *Wilkinson v. Leland*, 27 U.S. (2 Peters.) 627, 658 (1829), Justice Story writing for the Court noted that "[w]e know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal . . . ." Specifically, the Fifth Amendment's assertion that private property could be taken only for a "public use," U.S. Const. amend. V, was held to prohibit the redistribution of property for *private* uses.

The major exception to this rule was railroads, which were privately owned and operated. Yet railroads exercising the power of eminent domain were regulated by government so as to make them essentially public highways. *See, e.g., Bonaparte*

v. Camden & Amboy R.R., 3 F. Cas. 821, 829 (1830). Moreover, highways were generally considered proper functions of government to begin with; thus government could properly delegate the power of eminent domain to private developers to build these highways, so long as it regulated them in a way that kept the highways open to all members of the public. *See The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 88 (1872) (Field, J., dissenting) ("[E]xclusive grants for ferries, bridges, and turnpikes . . . [are] of a public character appertaining to the government. Their use usually requires the exercise of the sovereign right of eminent domain. It is for the government to determine when one of them shall be granted, and the conditions upon which it shall be enjoyed.").

The rationale of these cases was that since government had the authority to undertake projects for the welfare of the general public, it could delegate that authority in some cases to private companies. *See further County of Wayne v. Hathcock*, 2004 WL 1724875, at *11 (Mich. July 30, 2004). But since government had no legitimate authority merely to distribute "resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want," Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984), the government could not use eminent domain to benefit private parties. The regulations to which the railroads were subject ensured that the economic benefits they accumulated by using the eminent domain power were shared by the public, rather than by a private enterprise, and that the use of the land remained public. *See Hathcock*, 2004 WL 1724875, at **11-12.

On the other hand, as the Michigan Supreme Court explained in *Township v. Van Hoesen*, 87 Mich. 533 (1891), laws permitting condemnation for the benefit of private companies were unconstitutional:

> It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner, and transferring its title and control to a corporation, to be used by such corporation as its private property, uncontrolled by law as to its use; in other words, a use is private so long as the land is to remain under private ownership and control, and no right to its use or to direct its management is conferred upon the public.

Id. at 539.

This was an important rule because the use of eminent domain by private parties enables them to capture a surplus value not open to other members of the marketplace. As Prof. Epstein writes,

> [a] numerical example . . . makes the point clear. If the sum of all wealth in the state of nature is 100 and that in society is 150, then there is a potential surplus of 50, which must be distributed . . . . The surplus created by political life is distributed not only at the formation of the state but also during the course of its operation. When the state acquires private property for public use, the public use requirement should ensure the "fair" allocation of surplus by preventing any group from appropriating more than a pro rata share. Takings for private use are therefore forbidden because the takers get to keep the full surplus, even if just compensation is paid.

Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 163-64 (1985).

Courts have gradually drifted from this rule, however. In *Berman v. Parker*, 348 U.S. 26 (1954), this Court held that using eminent domain to eradicate slums was justified by the Public Use Clause because the eradication of slums was

beneficial to public health. Since "[i]t is within the power of the legislature to determine that the community should be beautiful," *id.* at 33, the Court concluded that "[o]nce the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Id.* The Court did not address the rule that when eminent domain is exercised by a private party, it must be regulated in a way that ensures that its use or management is used for public purposes. Rather, it held that so long as the legislature's purpose was legitimate, "the means by which it will be attained is also for [the legislature] to determine." *Id.*

After *Berman*, the rationale of slum-clearance condemnations was again broadened. Courts began to hold that "job creation" or other economic consequences justified the redistribution of property from one private party to another. Most famous among these cases was *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616 (1981), in which the Michigan Supreme Court allowed Detroit to condemn a neighborhood and give it to the General Motors Corporation to build an auto factory. *Poletown* held that "revitalizing the economic base of the community" was a public use. *Id.* at 634. (Significantly, the Michigan Supreme Court recently overruled *Poletown*. *See Hathcock, supra*.)

Earlier law prohibited the use of eminent domain for this purpose because there is no logical limit to redistributing property under that theory. Any interest group can show some plausible reason why giving it the property currently owned by others would benefit that interest group, and, therefore, the public. Under the rational basis standard this Court has applied to takings cases, however, *see Midkiff*, 467 U.S. at 241, such a failure of the political process can escape detection, which renders every person's property as insecure as in the "state of nature" that Thomas Hobbes described: "[T]here [can] be no propriety, no dominion, no *mine* and *thine* distinct; but only that to be every man's, that he can get: and for so long, as he can

keep it." Thomas Hobbes, *Leviathan* 101 (Michael Oakeshott ed., Collier Books 1962) (1651). The Constitution was written precisely to prevent this situation. *Cf. Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (explicitly rejecting Hobbesian theory of property rights).

Berman and *Midkiff* provide minimal guidance for determining when the purpose to be accomplished through a condemnation is a public use. *Midkiff* asserts that eminent domain may not be used for private purposes, *see, e.g.*, 467 U.S. at 240, but when a government agency asserts that a condemnation is a valid public purpose, the courts generally take their most deferential perspective in reviewing that assertion. *See id.* at 241 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.").

The legal consequence of this is that the Public Use Clause has been rendered essentially meaningless. *See, e.g., Gov't of Guam v. Moylan*, 407 F.2d 567, 568-69 (9th Cir. 1969) ("On urban renewal condemnations . . . the whole scheme is for a public agency to take one man's property away from him and sell it to another. The founding fathers may have never thought of this . . . but under all modern federal decisions our hands are tied—if the book on the procedure is followed."). As Prof. Epstein notes, some legal scholars have even taken to replacing the Clause with ellipses when they reprint the text of the Fifth Amendment. *See* Epstein, *supra*, at 162 (citing Bruce A. Ackerman, *The Jurisprudence of Just Compensation*, 7 Envtl. L. 509, 510 (1977)). This further suggests that lower courts need guidance in interpreting "public use," since any reading of the Constitution which renders a clause nugatory or redundant must be in error. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803); *United States v. Lopez*, 514 U.S. 549, 588-89 (1995) (Thomas, J. concurring).

These considerations recently led the Michigan Supreme Court to overrule its decision in *Poletown, supra*. *See Hathcock, supra*. By equating "public use" with "public benefit," the *Poletown* decision "would validate practically any exercise of the power of eminent domain on behalf of a private entity." 2004 WL 1724875, at *15. Since any private business will "contribute in some way to the commonwealth," *id.*, the *Poletown* court's interpretation had rendered the Public Use Clause nugatory and threatened the security of private property throughout the state: "After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like." *Id.*

This Court's decisions in *Berman* and *Midkiff* have created the same insecurity for property rights. The Court should grant certiorari to explain to what degree, if any, the federal Constitution's Public Use Clause limits the government's condemnation power.

II

GOVERNMENT'S POWER TO REDISTRIBUTE PROPERTY TO PRIVATE PARTIES SPURS COMPETITION AMONG INTEREST GROUPS

A. *Berman* and *Midkiff* Have Led to Thousands of Cases of Eminent Domain Abuse

The practical effect of the erosion of the "Public Use" Clause has been a rash of condemnations benefitting private parties. One recent study found over 10,000 instances of government using or threatening to use eminent domain to benefit private parties, just in the past five years. *See* Dana Berliner, *Public Power, Private Gain: A Five-Year,*

State-by-State Report Examining the Abuse of Eminent Domain (2003). Nationwide, over 3,700 properties have been condemned for the benefit of private parties since 1998. *Id.* at 2.

In fact, this estimate may be far too conservative, since many condemnations are not challenged by landowners, who often have few resources available to oppose a condemnation. Most eminent domain abuse occurs at the local level; for example, the City of Merriam, Kansas, recently condemned a Toyota dealership, in order to sell the land to the BMW dealership next door. Linda Cruse, *Merriam Sells Condemned Property to Baron BMW*, Kansas City Star, Jan. 27, 1999, at 4, *available at* 1999 WL 2402262. Las Vegas condemned the property of a private landowner to make way for an entertainment area that even included an adult strip club; the Nevada Supreme Court determined that this was a "public use." *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (2003), *cert. denied*, 124 S. Ct. 1603 (2004). The City of Bremerton, Washington, condemned 22 homes, including the home of an elderly widow named Lovie Nichols, in part to resell the land to private developers. Mrs. Nichols challenged the condemnation, but the court upheld the taking. *City of Bremerton v. Estate of Anderson*, 1999 WL 1116811 (Wash. App. Div. 2 Dec. 3, 1999), *rev. denied*, 10 P.3d 407 (Wash. 2000). The City of Corte Madera, California, condemned a private owner's land to give to a developer to build a grocery store. This, too, was permitted. *Town of Corte Madera v. Yasin*, No. A092777, 2002 WL 1723997 (Cal. App. 1st Dist. July 25, 2002). In one especially egregious case, billionaire Donald Trump nearly convinced the government of Atlantic City, New Jersey, to condemn the home of an elderly widow so that he could build a limousine parking lot. *See Casino Redevelopment Auth. v. Banin*, 727 A.2d 102 (N.J. 1998); Stephen Jones, Note: *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use*

Requirement of the Fifth Amendment, 50 Syracuse L. Rev. 285, 288 (2000).

The primary victims of such condemnations are poor minorities, and the primary beneficiaries are wealthy, politically powerful groups, who are more able to persuade local authorities to condemn property for their benefit. *See* Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California*, 32 Sw. U. L. Rev. 569, 598-99 (2003); Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 56 (1998). As explained below, the reason for this epidemic is what economists call the "public choice" phenomenon. Suffice to say that under the holdings of *Berman* and *Midkiff*, "the public use doctrine is no longer an impediment to interest-group capture of the condemnation power . . . ." Kochan, *supra*, at 51. This Court should grant the petition to provide lower courts with guidance as to how the Public Use Clause limits the use of eminent domain.

B. The "Public Choice" Phenomenon Arises When Government Can Redistribute Benefits and Burdens as Political Favors

Whenever government has the power to redistribute benefits and burdens between constituents, those constituents will devote time and energy to gaining control over government. Modern scholars refer to this as the problem of "public choice." Interest groups try to gain control of the apparatus of the state to secure benefits for themselves or to impose burdens on their enemies. *See* James M. Buchanan & Gordon Tullock, *The Calculus of Consent* 286 (Ann Arbor Paperbacks, 1965) (1962) ("[I]nterest-group activity . . . is a direct function of the 'profits' expected from the political process by functional groups . . . .").

As Buchanan and Tullock explain, interest groups lobby government to exercise its authority on their behalf: "[T]he

profitability of investment in [political] organization is a direct function of the size of the total public sector and an inverse function of the 'generality' of the government budget . . . . The organized pressure group thus arises because differential advantages are expected to be secured through the political process . . . ." *Id.* at 287. Economists call this pursuit of differential advantages "rent-seeking." *Dist. Intown Properties Ltd. P'ship v. Dist. of Columbia*, 198 F.3d 874, 885 (D.C. Cir. 1999) (Williams, J., concurring in the judgment). It leads to at least four major social problems.

First, it is fundamentally unfair for citizens to have their property taken from them and given to others not for punishment, or for any other valid public reason, but simply because they are less successful at political activism. As Prof. Sunstein has put it, the framers of the Constitution believed it was unjust for "government power [to] be usurped solely to distribute wealth or opportunities to one group or person at the expense of another." Instead, they believed that "government action [should] result[ ] from a legitimate effort to promote the public good rather than from a factional takeover . . . . Under that conception, the task of legislators is not to respond to private pressure but instead to select values through deliberation and debate." Sunstein, *supra*, at 1690-91.

Second, rent-seeking is economically inefficient, because it encourages groups to invest their resources and energy into nonproductive activity such as lobbying rather than into wealth-creating activity or innovation. Businesses spend time and money hiring lobbyists and attorneys to persuade city officials to condemn property for their benefit, rather than finding new and more economical ways to meet consumer demands. *See generally*, Gordon Tullock, *Rent Seeking as a Negative-Sum Game*, in *Toward a Theory of the Rent-Seeking Society* 16 (James M. Buchanan, et al., eds., 1980); Buchanan & Tullock, *supra*, at 111 ("[B]argaining opportunities afforded in the political process *cause the individual to invest more*

resources in decision-making, and, in this way, cause the attainment of 'solution' to be much more costly."). This therefore harms the public because it distracts producers from meeting consumer needs.

Third, rent-seeking tends to have a ratchet effect. Since the benefits conferred by government will be localized and concentrated, while the costs are broadly dispersed, the incentives will be skewed toward increased lobbying and ever-increasing amounts of wealth distribution. *See* Buchanan & Tullock, *supra*, at 287-88 (noting "spiral effect" of ever-greater lobbying efforts). Suppose government takes one dollar from each of 100 people, and gives it all to person X. It is in X's interest to spend at most $100 to convince the government to do this again; but it is only in the interest of each victim to spend $1 to convince it to leave them alone. *See also* Kochan, *supra*, at 81 ("It is not cost-efficient, however, for a taxpayer to fight a particular piece of special-interest legislation."). Rent-seeking behavior therefore tends to "restrict[ ] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . ." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

The fourth problem, related to the third, is that rent-seeking behavior rewards those who are already most wealthy and powerful. A group's wealth can greatly affect its ability to influence legislation. *See McConnell v. Fed. Election Comm'n*, 124 S. Ct. 619, 644-45 (2003). Small grass-roots organizations, or individuals, are less able to rally support behind a cause, and when the cause in question is the redistribution of wealth to the winner of the election, winners become increasingly likely to win the next time around. This problem is acute in eminent domain abuse.

> Even though a particular condemnation may concentrate the cost of the taking on the affected landowner and the information costs associated with identifying that impact may be low, that owner is not likely to invest enough to successfully oppose the condemnation. First, the existence of compensation, even when not truly substituting for market or subjective value, decreases the cost to the affected owner of the land seized and thereby decreases his incentive to invest in fighting the condemnation. Furthermore, the special interest is likely to have more political influence, because unlike the landowner, the interest group is probably a repeat player in the political process and thereby able to offer more to legislators . . . . "[T]he dispossessed [property owners] are disadvantaged by the one-shot nature of their involvement. Thus, relative to other concentrated groups (such as the construction firms that may support government construction), they may have less clout." Additionally, the interest group is unlikely to seek rents through condemnation and transfer if it does not believe that it has a reasonable likelihood of success.

Kochan, *supra*, at 82 (quoting Daniel A. Farber, *Public Choice and Just Compensation*, 9 Const. Comment. 279, 290 (1992)). Experience bears out these predictions. Wealthy neighborhoods are rarely condemned for "economic development." Instead, poor or middle class neighborhoods are condemned to make way for those in higher income brackets. For example, in one recent case, the city of Canton, Mississippi, tried to condemn 23 acres of minority-owned land to give to the Nissan Corporation to build an auto plant. Sandefur, *supra*, at 598. Although the state dropped its case before the State Supreme Court ruled, the case is typical of economic development condemnations: landowners who are less politically adept are at the mercy of those who exercise raw political power.

C. The Public Use Clause Was Intended to Limit the Public Choice Effect

Buchanan & Tullock, *supra*, explain that there are two primary ways to limit rent-seeking behavior: either to prohibit government entirely from distributing any economic rents to interest groups, or to require it to distribute such advantages equally: "[W]e may imagine a government that undertakes only those activities which provide *general* benefits to all individuals and groups and which are financed from *general* tax revenues. Under these conditions there would be relatively little incentive for particular groups of individuals to organize themselves into associations designed specifically to secure special advantages through governmental action." *Id.* at 287. *See also* The Federalist No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) ("There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.").

In other words, when government can confer concentrated benefits on a particular class, that class has a greater incentive to lobby the government to give it that benefit. So, where the benefit is legally required to be given to everyone equally—where, the surplus must be shared *pro rata*, as Epstein says, *supra*, at 164—this incentive for lobbying will be much less.

> If all collective action should be of such a nature that the benefits and costs could be spread equally over the whole population of the community, no problem of the interest group, and indeed few of the problems of government, would arise. If each individual, in his capacity as choice-maker for the whole group, could, in his calculus, balance off a pro-rata share of the total benefits against a pro-rata share of the total costs, we could expect almost any collective decision-making rule to produce reasonably

> acceptable results . . . . [and] groups would have relatively little incentive . . . to utilize the political process to secure advantages over their fellows . . . . One means of . . . [approximating] truly "general" legislation would be to require that those individuals and groups securing differential benefits also bear the differential costs.

Buchanan & Tullock, *supra*, at 291-92.

The Public Use Clause is an example of a rule which requires government to provide *general* benefits to all individuals and groups, and thus prohibits the granting of concentrated benefits to particular groups. James Madison, who wrote the Public Use Clause, explained that government was created to "*impartially* secure[ ] to every man, whatever is his *own*." *Property, reprinted in Madison: Writings* 515 (Jack N. Rakove ed., 1999). But strong interest groups—or "factions," as he called them—could take over the government and use it to their own benefit by stealing the property of their opponents; by, in Madison's words, "unit[ing] and oppress[ing] the weaker [interest groups]." The Federalist No. 51, at 323-24 (James Madison). There were two ways to prevent the stronger faction from committing this injustice: either by "creating a will in the community independent of the majority," which would impartially supervise interest groups to ensure they do not violate the Constitution, or by balancing interest groups against one another to prevent them from uniting. *Id.* The Constitution embraced both methods—the latter through the electoral processes, and the former by creating an independent judiciary. *See id.* No. 78, at 465-68 (Alexander Hamilton). The Public Use Clause would ensure that when property was condemned, the public at large, rather than the condemning authority, would share in the surplus—or, in Madison's words, "the vital principle of monopoly [would be] lost. The benefit is not confined to one or a few, but is enjoyed by the whole or a majority of the Community." Detached Memorandum on

Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments. (c. 1819), in Rakove, *supra*, at 757.

The Public Use Clause was designed to avoid the "Public Choice" problem by deterring factions from seizing property for their own benefit. *See further* Sunstein, *supra*, at 1689 (the public use limitation is "focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.") As Madison explained elsewhere,

> there is no maxim . . . more liable to be misapplied . . . than the current one, that the interest of the majority is the political standard of right and wrong. Taking the word "interest" as synonymous with "ultimate happiness," in which sense it is qualified with every necessary moral ingredient, the proposition is no doubt true. But taking it in the popular sense, as referring to immediate augmentation of property and wealth, nothing can be more false. In the latter sense it would be the interest of the majority in every community to despoil and enslave the minority of individuals . . . . In fact, it is only re-establishing, under another name and a more specious form, force as the measure of right.

Letter to James Monroe (Oct 5, 1786) in *The Complete Madison* 45 (Saul K. Padover ed., 1953). By ensuring that all members of society had a pro rata share in the surplus gained through condemnations, the Public Use Clause qualified the power of eminent domain with the necessary moral ingredients. Moreover, it ensured that the condemning power could not keep all the profits of the taking, but would be forced to share those benefits with the public at large. The power of eminent domain would therefore not be used by powerful interest groups to

"despoil" the less powerful. The erosion of the public use limitation under *Berman* and *Midkiff*, however, has practically eliminated this protection. The Court should take this opportunity to cure this error and protect innocent, politically uninfluential landowners from falling victim to the public choice problem.

III

THE COURT SHOULD PLACE MEANINGFUL LIMITS ON EMINENT DOMAIN TO REIN IN THIS POLITICAL BREAKDOWN

Under our Constitution the judiciary serves as "an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." The Federalist No. 78, at 467 (Alexander Hamilton). This means that where factions unite to unconstitutionally suppress or commandeer the property of a minority simply because it lacks the political power to protect itself, the Court ought to step in. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982). One might describe condemnations which benefit private parties as a breakdown of a constitutional process that was designed to protect the people impartially. *See* The Federalist No. 51, at 324 (James Madison) ("In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger."). In such circumstances, judicial review is appropriate.

The erosion of the Public Use limitation has led to an epidemic of special-interest lawmaking, whereby powerful private interests exercise their skill at lobbying to profit at the expense of less powerful groups. This public choice effect is a breakdown of the protection provided by the Public Use Clause which can only be rectified by this Court. The Court should reconsider its decisions in *Berman* and *Midkiff* and provide

lower courts with guidance as to how to determine when a condemnation is so private as to violate the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be *granted*.

DATED: August, 2004.

Respectfully submitted,

TIMOTHY SANDEFUR
Of Counsel
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amici Curiae Buchanan, Tullock, and Pacific Legal Foundation